In the Supreme Court of the United States.

OCTOBER TERM, 1918.

L. G. CALDWELL AND J. A. DUNWODY, copartners, trading as Caldwell and Dunwody, appellants,
v.
THE UNITED STATES.
No. 325.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

Appellants sued in the Court of Claims for $26,454.90, and their petition was dismissed on demurrer.

STATEMENT OF THE CASE.

The petition alleged the following facts:

On January 4, 1906, the petitioners were appointed timber agents of the Denver, Northwestern & Pacific Railway Company, for the purpose of cutting and manufacturing railroad ties from timber on public lands adjacent to the line of railroad then under construction in Colorado, under authority of the act of Congress of March 3, 1875, granting right of way for railroads through the public domain and authorizing the taking of timber from public lands for construction purposes.

Thereafter they entered into another contract with the railway company for 150,000 additional railroad ties to be cut from the public lands adjacent to the railroad, a part of their compensation being that they were to receive the slash from such tie cutting. And under this contract they manufactured and delivered 132,428 ties, which were used by the railroad company in the construction of its lines, leaving a large amount of slash. On December 17, 1906, the petitioners agreed to sell to a timber company a large amount of this slash, and also entered into a contract with a coal company to furnish 200 cars of mining props to be cut from the slash not sold to the timber company, the purchase by both companies being for the purpose of using the slash and poles in the State of Colorado, and petitioners intended to utilize the remainder of the slash for purposes mentioned in the acts of 1878 and 1891 (which will be hereafter referred to) and in said State of Colorado. Petitioners cut some of the slash into poles on the ground, but by reason of heavy snow during the winter they could not be gotten out for delivery, and all of the slash, whether cut into poles or not, was left on the ground to be handled in the spring. Before spring, however, the land upon which the ties were cut was by presidential proclamation of March 2, 1907, included in the Medicine Bow National Forest. Thereafter the petitioners resumed the cutting of the slash into mine props in order

to carry out their contracts with the coal company, and the timber company attempted to take possession of the portion of the slash agreed to be sold to them. But this was stopped by officers of the Forest Service of the United States, who took the position that the tie slash belonged to the United States and came under the jurisdiction of the officers of the service. The officers of that service permitted the petitioners to remove the poles which they had theretofore manufactured, and also to take all the tops and refuse on a so-called fire guard of a width of 250 feet from the railroad extending for a distance of two miles. The remainder of the tie slash, over the protest of the petitioners, was taken possession of by the Forest Service and sold and the proceeds covered into the Treasury of the United States. Petitioners do not know the amount received by the United States, but aver that the value of the tie slash so taken and disposed of by Federal officers was $26,454.90. Petitioners applied to the Forest Service for reimbursement but were refused.

BRIEF.

It will be seen that this case turns upon whether the appellants, by virtue of their contract with the railroad company, became the owners of this tie slash. If not, they have no right to recover.

The railroad company had the right, through its agents, to cut and manufacture the ties which were

furnished to it by appellants under an act of Congress passed March 3, 1875, providing:

> That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad.

The appellants' claim rests upon the contention that this act granted to the railway the right to the whole tree when cut down, though only a part of it could be used for railroad construction. But statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee, and nothing passes by the grant but what is conveyed in clear and explicit language. (*Wisconsin Central Ry. Co.* v. *United States*, 164 U. S. 190; *United States* v. *Oregon, &c., Railroad*, 164 U. S. 526.) And construing this very statute this court has at least intimated that the right to take timber necessary for the construction of the railroad did not include the right to take timber for constructing rolling stock or equipment. (*United States* v. *Denver, etc., Ry. Co.*, 150 U. S. 1.) And in *United States* v.

Denver, etc., Ry. Co. (190 Fed. Rep. 825, 826) it was expressly held that the railway company acquired no title to the tops of trees as claimed in this case.

It is respectfully submitted that under no fair interpretation of this statute is the railroad given title to any timber except such as is necessary for the construction of the railroad. All other timber on the land, whether standing or consisting of parts of trees which have been used for the purpose of railroad construction remained the property of the United States. And if the railroad company had no title to this slash, it could, of course, communicate no title to appellants.

The appellants, however, rely upon the letter above quoted from the officer of the Land Office, and, in effect, insist that the result of this letter was to make a gift to them of the slash. It is sufficient answer to say that if this slash belonged to the United States, no officer of the Government had any authority to give it away. (*Steel* v. *United States*, 113 U. S. 128; *Flores* v. *United States*, 18 C. Cls. 352.)

The only other claim made by appellants is that they may rely for title upon the act of March 3, 1891 (26 Stat. 1095, 1099), which provides as follows:

> And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Navada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for

> a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timberlands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same.

In the present case, however, the appellants who cut the timber did not cut it for any of the purposes named. They cut it, in the first instance, for the purpose of railroad construction, as authorized by the act of 1875. They were not proposing to use the slash for any of the purposes mentioned in the act of 1891. On the contrary, the use which they proposed to make of it was to sell it and traffic with it. Whatever purpose the purchasers from them intended, it can not be said that *they* were making any of the specified uses of it. On the contrary, the sale by them expressly negatived such a purpose. Manifestly, it was not the purpose of this act to confer the right upon any one to traffic in any part of the timber upon the public lands. The contention of the appellants can scarcely be more completely refuted than by quoting from an opinion rendered by Mr. Justice Van Devanter, while Assistant Attorney General, to the Secretary of the Interior, as follows:

> There is nothing in this act which suggests that it was the purpose of Congress to thereby authorize or provide for the sale of timber on the public lands. As gathered from a careful

examination of the terms of the act, its purpose seems to have been to modify the law relating to the cutting and removal of timber from lands of the United States by denying to the Government the right then existing to demand a conviction in the criminal prosecution, or a recovery in a civil action when in any of the States, Territories, or regions named, timber is cut or removed from the public timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under the rules and regulations made and prescribed by the Secretary of the Interior, and is not transported out of that State or Territory. * * *

I am of the opinion that the legislation under consideration does not authorize the sale of timber, and inasmuch as the regulations of March 17, 1898, *supra*, provide for sales thereof, I advise that said regulations be reformed and brought within the authority given the Secretary of the Interior by the statute under which they were prescribed.

It is respectfully submitted that there is no error in the judgment of the Court of Claims and it should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

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